Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

Scott Carter, Petitioner,

v.

Daniel J. Good, individually and in his official capacity as Sheriff of Rutherford County; AETNA Life & Casualty Company, Surety, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the balancing test of Pickering v. Board of Education, 391 U.S. 563 (1968), must be applied to the free speech claim of a sheriff's deputy dismissed for supporting a possible opponent and disagreeing with the sheriff's policy limiting lawful campaign activities of deputies during a primary election.

2. Whether the political patronage standards set out in Branti v. Finkel, 445 U.S. 505 (1980), and Elrod v. Burns, 427 U.S. 347 (1976), permit the discharge of a sheriff's deputy, regardless of his rank or duties, for alleged campaign activity during a primary in which the sheriff is not candidate?

PARTIES

The plaintiff is Scott Carter, a former deputy sheriff in Rutherford County, North Carolina. The Defendants are Daniel J. Good, in his individual and official capacity as Sheriff of Rutherford County, and Aetna Life & Casualty Company, Sheriff Good's surety.

In the Fourth Circuit, the defendants were the appellants and plaintiff was the appellee. Plaintiff is the petitioner here.

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Daniel J. Good, individually and in his official capacity as Sheriff of Rutherford County; AETNA Life & Casualty Company, Surety, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Scott Carter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Fourth Circuit is reprinted in the appendix to this petition beginning at 1a. The district court opinion is reported at 951 F. Supp. 1235 and is reproduced in the appendix beginning at 10a. References in the Petition to the joint appendix in the court of appeals are designated J.A.

JURISDICTION

After respondent appealed the district court's denial of its motion for summary judgment, the Fourth Circuit placed the case in abeyance pending its decision in Jenkins v. Medford, 119 F.3d 1156 (4th Cir. 1998) (en banc). The parties submitted supplemental briefs addressing the impact of the Jenkins decision on this case. On May 19, 1998, the panel dismissed this case in light of its decision in Jenkins. The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

A. Factual Background

Scott Carter was hired by the Rutherford County Sheriffs Department in April of 1990 to serve as a road deputy. In 1994, he was discharged because he had expressed support for a potential political opponent of the Sheriff, and while on vacation, disagreed with the Sheriff's unwritten policies limiting the deputies' lawful, off-duty speech.

When Carter joined the Sheriffs Department, Edgar Searcy was the Sheriff and John Smart, Jr. was the Chief Deputy. J.A. pp. 52-53. Shortly thereafter, Searcy was defeated in the Democratic primary by James Freeman. In the general election, Republican Dan Good defeated Freeman and became Sheriff. J.A. p. 59. When Good took office in December, 1990, he demoted John Smart to captain of the Road Division. J.A. pp. 53-54.

In 1994, when the events relevant to this action took place, there were approximately fifty employees in the Sheriffs Department. J.A. p. 138.[1] The top three officers in the

[1] Currently there are over 9,700 deputy sheriffs in North Carolina, in departments of varying size. See Sheriffs Standards Division Statistical Report for Month Ending June 1998.

department were the sheriff, the chief deputy, and the captain of the road division. J.A. p. 133. Sheriff Good relied upon his chief deputy, captain of the road division, and lieutenant of detectives in developing and implementing departmental policies.[2] J.A. p. 43, 141-42. If anything serious occurred when the sergeant in charge was not present, a corporal was expected to call the captain, the chief deputy, or the sheriff, who would make the required decisions. J.A. p. 43. Until March of 1994, Carter was a road deputy with the rank of corporal. At the time of his discharge, Carter was serving as a jail deputy under the jail corporal. J.A. p. 71.

In 1994, Sheriff Good ran for re-election as a Republican candidate. Captain Smart resigned and filed as one of four candidates in the Democratic primary for sheriff. At this time a written policy regarding political activities was set out in the personnel manual which read:

> Members of the Rutherford County Sheriffs Department are permitted to support the political party of their choice when they are off duty. At no time will officers engage in any political activity when they are on duty, in uniform or while operating an assigned or non-assigned county owned vehicle.

J.A. p. 193. This policy was consistent with state law, which provides that county employees shall not be restricted from affiliating with partisan or political organizations, or from supporting partisan candidates of their choice, while off-duty. N.C. Gen. Stat. § 153A-99(a).

The sheriff's actual policy, however, was that

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[2] Below the captain were five road sergeants, each in charge of a different shift. J.A. p. 135. In addition, the department had a lieutenant of detectives, a sergeant in charge of the jail, and a sergeant in charge of the DARE program. Below the sergeants were six deputies who served as corporals, five on the road and one in the jail. J.A. pp. 133-39. The remaining law enforcement personnel in the department were deputies.

employees of his department, whether on or off duty, were permitted to solicit funds and support for Sheriff Good's candidacy, but were not permitted to show support in any fashion for Good's opponents. The Sheriff expressly instructed two of his deputies: "You don't have to work on [my campaign] but . . . you can't work on anybody else's." J.A. p. 37. He made it clear to them that this mandate was a condition of employment: "As long as you do the job you're doing now and stay out of politics . . . you're okay with me." J.A. p. 38.

In compliance with the sheriff's policy, employees openly worked on his campaign while on the job. The chief deputy and other on-duty deputies solicited campaign contributions for him from on-duty employees. J.A. p. 93. Deputies raised money during the shift change to rent a billboard in support of Good's candidacy. J.A. p. 130-31. The sergeants encouraged deputies to "pitch in and show the boss we're behind him." Id.

Believing that Carter might support Smart's campaign, Sheriff Good first warned Carter several times to "stay out of politics" or risk losing his job, and then reassigned Carter to the jail, where he no longer drove a patrol car and reported to another corporal. J.A. pp. 60-61, 66-67, 71. When Carter confirmed that he supported Smart and suggested this was punishment for his support, Good responded that "he was the sheriff, he could do what he wanted to do, and if John Smart becomes the sheriff, then John could do what he wanted to do." J.A. p. 65.

Shortly after this conversation Carter, while on vacation, ate at a local Pizza Hut with his son and a friend. Both Carter and his friend were wearing "Vote for John Smart" campaign hats. J.A. p. 79. They were approached at the restaurant by several on-duty officers from the department, one of whom said that he hated to see what had happened to Carter in the department. J.A. pp. 80, 125. Carter responded that he

"was the only one who had the balls to stand up to Sheriff Good and tell him who I supported." J.A. p. 80.

The deputy reported this conversation to the Chief Deputy, who in turn reported it to Sheriff Good. J.A. pp. 126-27, 171-72, 215-16. Good instructed his Chief Deputy to tell Carter that his services were no longer needed. J.A. pp. 84, 169, 221-22. Carter was formally discharged on March 8, 1994. Sheriff Good testified that the Pizza Hut incident was the primary factor that motivated him to terminate Carter. J.A. pp. 173-74.

In May, John Smart lost the democratic primary to former sheriff Edgar Searcy. Searcy lost to Good in the November general election. Deputies who privately supported Good's opponents were not discharged. Carter v. Good, 951 F.Supp. 1235, 1242 (W.D.N.C. 1996) ; Appendix B p.18a.

B. Proceedings Below

Carter filed an action alleging both state law claims and a claim under 42 U.S.C. § 1983 against Good and his surety, asserting in part that he was terminated by Good in violation of his First Amendment rights of free speech and association. The defendants moved for summary judgment recognizing that Carter's case was not a "raw political patronage" dismissal under Elrod v. Burns, 427 U.S. 347, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976), and Branti v. Finkel, 445 U.S. 507, 63 L.Ed.2d 574, 100 S.Ct. 1287 (1980), but a claim of retaliation for Carter's exercising his free speech rights. Carter v. Good, 951 F. Supp. 1235, 1242 (WDNC 1996). The district court denied summary judgment, holding that by wearing a "Vote John Smart for Sheriff" hat, Carter was making "an expression of public concern in the most elementary sense," and that his statement that he was stronger than the other deputies for

daring to show his statutorily protected support for another candidate was "certainly a matter of public concern." Id. at 1243. The court weighed Carter's interest in the speech against the sheriff's interest in smooth operation of his department during an election year, finding that the only possible "disruption" in the department was caused not by Carter but by the sheriff's own officers, that Carter had not breached any policy or distributed any campaign literature, and that Carter's free speech interests were not outweighed by the Sheriff's interests. The court concluded that the defendants had not demonstrated that Carter would have been discharged despite the protected speech, noting that Good himself testified that the Pizza Hut incident was the event which precipitated Carter's termination. Id. at 1241, 1244-45.

The Fourth Circuit held defendant's appeal in abeyance pending its decision in Jenkins v. Medford, 119 F.3d 1156 (4th Cir. 1997). Jenkins held that a newly-elected North Carolina sheriff may dismiss any deputy because of political affiliation or campaign activity. Id. at 1164. Following the Jenkins opinion, the parties submitted supplemental briefs addressing its impact on Carter's case. On May 19, 1998, the court issued a per curiam opinion dismissing Carter's case in light of the Jenkins opinion. Carter v. Good, No. 96-1965, slip. op. (4th Cir. May 19, 1998).

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Opinion Disregards This Court's Instruction In *O'Hare Trucking Service* That The *Pickering* Balancing Test Must Be Applied To Claims Alleging That A Discharge Resulted From The Exercise of Protected Speech.

This Court has long recognized that a State may not condition public employment on an employee's exercise of First Amendment rights. See, eg., O'Hare Truck Service v. City of Northlake, 518 U.S. 712, 135 L.Ed.2d 874, 880, 116 S.Ct. 2353 (1996); Pickering v. Board of Ed., 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 173 (1968). In O'Hare, this Court distinguished the analysis to be used when public employees claim they were terminated due to their political affiliations from the analysis which controls when public employees claim they were terminated because of their speech. Where such an employee asserts that discharge was motivated by party affiliation, the question is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." O'Hare, 135 L.Ed.2d at 882 (citing Branti, 445 U.S. 507). However, when the employee asserts that he was terminated because of his speech, the trial court must balance the interest of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. O'Hare, 135 L.Ed.2d at 882 (citing Pickering, 391 U.S. 563).

The Fourth Circuit's decision in this case simply reiterated its Jenkins analysis and ignored the mandate of O'Hare. The Jenkins plaintiffs were North Carolina deputy sheriffs terminated by a newly-elected sheriff after they supported and campaigned for opposition candidates. The *en banc* majority both rejected the deputies' Elrod-Branti freedom of association claims *and* merged their Pickering free speech claims into that Elrod-Branti analysis. Compare Id. at 1160 with Id. at 1165 (Motz, J., dissenting). Following the lead of the Seventh and Eleventh Circuits, the Fourth Circuit applied the policymaker exception of the Elrod-Branti rule to *all* deputy sheriffs, now almost 10,000 in number, in *all* North Carolina

Sheriff's Departments, be they jailers, patrol deputies, or the chief deputy, by declaring that they were "policymakers" subject to dismissal for either their political affiliation or *campaign activity*. Id. at 1164. The Fourth Circuit did not consider the Pickering balancing test or apply it to the plaintiffs' free speech claims.

Though the defendants here had previously conceded that Carter's was a free speech claim, not a political patronage claim, the Fourth Circuit reasoned that a deputy's speech which is related to an election in any way is "campaign activity" unprotected by the First Amendment. Carter v. Good, No. 96-1965, slip op at 4-5, (4th Cir. May 19, 1998). The court found that Carter's conduct at the Pizza Hut was such "campaign activity" and that his dismissal was therefore proper under the Jenkins rule that sheriffs may discharge deputies because of either political affiliation or campaign activity. It did so despite the fact that, at the time of the discharge, Good was already in office and Carter had merely acknowledged his support of a candidate in the primary and disagreed with the sheriff's effort to subvert the written policy of the department and applicable state law.

The Fourth Circuit's decisions here and in Jenkins create a new category of unprotected speech which now includes an off-duty deputy's comment to colleagues regarding their fear of supporting even potential opposition to the incumbent sheriff. Carter was discharged because he told a colleague that he was not afraid to stand up to Good and say who he supported in the primary. As the trial court found, Carter was neither actively campaigning nor attempting to get other deputies to vote against Good. He was addressing a matter of public concern, the sheriff's unwritten policy which did not allow deputies to support other candidates while encouraging support for himself. Carter v. Good, 951 F. Supp. at 1243. Under the Fourth Circuit's analysis, disagreement

with the current sheriff's policies or acknowledgement that one favors a candidate in the opposing party's primary, renders the speech campaign activity which is unprotected and a ground for termination.

A proper application of Pickering to Carter's claims would materially affect the outcome of the case. When the district court applied the Pickering test it found that Carter's wearing a "Vote for John Smart" hat and statement in the Pizza Hut, while on vacation, constituted speech that addressed matters of public concern and was therefore protected as a matter of law. Balancing Carter's interest in this free speech against the sheriff's interest in the smooth operation of his department, the district court found that the only disruption was caused by the defendants themselves and correctly held that Carter's interests outweighed Good's interests as a matter of law. Carter v. Good, 951 F. Supp. at 1243-45. At this stage of the litigation, Carter has made out a free expression claim under Pickering. The Fourth Circuit's erroneous Elrod-Branti analysis must be overturned so that Carter, and deputies like him, can vindicate their First Amendment rights.

II. This Court Must Resolve The Conflict In The Circuits Regarding The Standard Which Applies To Free Speech Claims During A Political Campaign And Instruct That Such Cases Require Pickering Analysis.

Two Courts of Appeals have properly drawn the distinction between Elrod-Branti political patronage cases and Pickering free speech cases as required by this Court in O'Hare. Both the Fifth and Eleventh Circuits recognize that the Elrod-Branti and Pickering analyses are distinct and are to be applied after careful analysis of the facts. See e.g., Vojvodich v. Lopez, 48 F.3d 879, 884 (5th Cir. 1995) ("Although the fact

that a public employee holds a policymaking position is relevant to the required balancing of interests, it is not the ultimate determination."), cert. den., 516 U.S. 861 (1995); Morris v. Crow, 117 F.3d 449, 456 (11th Cir. 1997) ("It is important to retain the distinction between political patronage cases and free expression cases, because the analysis applicable to the two types of cases is markedly different."); Stough v. Gallagher, 967 F.2d 1523 (11th Cir. 1992).[3]

In Stough v. Gallagher, the Eleventh Circuit rejected the Elrod-Branti standard and applied the Pickering test where the highest ranking deputy in the sheriff's department claimed that the sheriff retaliated against him because of his "association with and political speech in support of [the sheriff's] opponent[.]" Id. at 1524. Rejecting the defendant's argument that this claim was governed by Elrod-Branti and should therefore be dismissed under Terry v. Cook, 866 F.2d 373 (11th Cir. 1989), the Eleventh Circuit held that the "action of demoting [the plaintiff] for political speech and campaigning activities for the opposition is appropriately reviewed under the speech category and analyzed using the Pickering-Connick-Rankin test." Id. at 1528.

The Fourth Circuit considered identical circumstances in Jenkins and reached the opposite conclusion, holding that all political campaign speech and activities are governed by Elrod-Branti. It then extended its holding to Carter's claim, which involved off duty support for a political rival and disagreement with the sheriff's unwritten policy regarding deputies' election activity.

The First, Second and Seventh Circuits have similarly

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[3] See also Cutcliffe v. Cochran, 117 F.3d 1353, 1358 n. 5 (11th Cir. 1997) (Pickering analysis warranted if plaintiff deputies had alleged their expressive conduct went beyond "mere manifestation of political affiliation" and was substantial or motivating factor in dismissals).

held that a policymaker or confidential employee may be discharged because of political speech and activities, just as for political affiliation, without any balancing of interests. Only one of these cases, however, McEvoy v. Spencer, 124 F.3d 92 (2nd Cir. 1997), was decided subsequent to this Court's decision in O'Hare.

McEvoy was the Police Commissioner of Yonkers, New York. Spencer, a candidate for mayor of Yonkers, ran on a platform that included removal of McEvoy as Police Commissioner. Upon his election, Spencer demoted McEvoy. The Court of Appeals concluded that if a public employer can dismiss or demote a policymaking employee "merely because it dislikes the employee's political affiliation, the employer should be permitted to take the same action where the employee not only belongs to a disfavored political party or holds the 'wrong' political belief," but also "disrupts the workplace by speaking out." McEvoy v. Spencer, 124 F.3d at 101. The court's caveat that the policymaker had disrupted the workplace by speaking out appears to mix part of the Pickering test into its muddled analysis. While the McEvoy court reviewed the substantial disagreement between the circuits, it failed to acknowledge O'Hare. After its review the court concluded that, "in this context, where the lines between political association and speech are often blurred, we conclude that adverse action may be taken against a policymaker because of political affiliation, even if the employer was also motivated in part by speech protected under Pickering." McEvoy v. Spencer, 124 F.3d at 98-100.

The two other decisions which agree with the Fourth Circuit's reasoning predate O'Hare. Rodriguez v. Munoz, 808 F.2d 138, 144 (1st Cir. 1986)("If the court finds that plaintiff's position is indeed one for which political affiliation would have been a legitimate requirement . . . the court should find that dismissal here was constitutionally permissible and enter

judgment for defendant. This is so even though [plaintiff] was fired for his political activity, not affiliation."). Warzon v. Drew, 60 F.3d 1234, 1238 (7th Cir. 1995) ("[If plaintiff] was a confidential or policymaking employee, her superiors could, consistent with the First Amendment, fire her for advocating positions in conflict with their stated policies.")

The current conflict in the circuits on the central guarantee of the First Amendment affects one of the largest groups of public employees in the country. With this division between the circuits, the rights of deputies who speak out during a political campaign, on their own time while off-duty, differ drastically depending on the circuit where a deputy resides. While this Court directed in O'Hare that such claims be analyzed under the Pickering balancing test, see O'Hare, 135 L.Ed.2d at 882, the Fourth Circuit and three other Courts of Appeals are not doing so. This Court should again instruct the lower courts that Pickering provides the proper analytical framework for speech claims arising in a political context.

III. The Fourth Circuit's Dismissal of Carter's Case Has The Pernicious Effect Of Subverting One Of The Central Purposes Of The First Amendment.

The Fourth Circuit's application of its Jenkins analysis to Carter's free speech claim subverts one of the central purposes of the First Amendment: the unfettered interchange of ideas so that the citizenry can intelligently select its government officials. The Fourth Circuit failed to recognize that Carter's case was not one of a newly elected or re-elected sheriff "cleaning house." A patronage system where deputies who are truly policymakers are dismissed because of their political affiliations after the election can perhaps be defended on the grounds that such actions are sanctioned by the electorate, whose selection of a candidate indicates voter approval of that candidate's expressed political agenda. See, Jenkins, 119 F.3d at 1162. That justification cannot support firing Carter long before the election for his speech.

Carter started as a road deputy in April, 1990, under Sheriff Searcy. Good was elected in the fall of 1990. Good retained Carter, who worked in the department for three more years and was promoted. Carter was fired seven months before the election in November, 1994. Carter v. Good, 951 F. Supp. at 1239-42. Good fired him for wearing a Smart campaign cap and for openly disagreeing with the Sheriff's censorship. J.A. pp. 61-64. Good did not fire Carter because he had just taken office and was answering the call of the electorate to clean house in the Sheriff's department; he fired him for exercising his right to free speech. Carter, 951 F. Supp. at 1241.

The Fourth Circuit's dismissal of Carter's case has the pernicious effect of suppressing the speech of citizens who are in the position to know and inform others about the policies of incumbent officials. This Court "has long recognized that one of the central purposes of the First Amendment's guarantee of

freedom of expression is to protect the dissemination of information on the basis of which members of our society may make reasoned decisions about the government." Connick v. Myers, 461 U.S. 138, 161, 75 L.Ed.2d 708, 729 (1983) (Brennan, J., dissenting) (citing cases). This is precisely why Pickering requires balancing the interests of the public employee as a citizen speaking out on a matter of public concern with the State's interest of promoting efficiency of public services through that employee.

Allowing a Sheriff the freedom to fire a deputy for conduct like Carter's before an election will have a chilling effect on the speech of deputies who would otherwise be safe to speak out on what could subsequently be construed as a "campaign issue." By applying its Jenkins rationale to Carter's case, the Fourth Circuit has erected a shield around North Carolina sheriffs, insulating their acts and allowing them to wave the threat of termination over the head of any deputy who speaks out near election time about what goes on inside the sheriff's department. In doing so, the Fourth Circuit has subverted the democratic process that the First Amendment was created to protect.

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Jenkins, 119 F.3d at 1170 (Motz, J., dissenting) (citing Buckley v. Valeo, 424 U.S. 1, 14, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), internal quotes omitted).

The potential impact of this decision is far-reaching. Currently there are close to ten thousand deputy sheriffs in

North Carolina who are now deterred from making comments about the incumbent sheriff's actions prior to an election. The Fourth Circuit's dismissal of Carter's case cannot by squared with the dictates of the First Amendment.

IV. The Fourth Circuit's Failure to Apply The Analysis Required By Elrod-Branti Is In Conflict With The Decisions of The Third, Fifth, Sixth, Ninth and Tenth Circuits.

The Fourth Circuit's decision in Jenkins should not have governed the outcome of this case because that holding not only misapplies the Elrod-Branti rule, but also conflicts with correctly reasoned decisions in other Circuits. Elrod and Branti established that patronage dismissals of public employees are permissible only where the employer can demonstrate that party affiliation is an appropriate requirement for the effective performance of the job involved. The Fourth Circuit hypothesized in Jenkins that, because a few deputies might have a confidential or advisory role in a sheriff's department, party affiliation was an appropriate job requirement for all North Carolina deputies, no matter what their responsibilities. Contrary to the particularized factual analysis mandated by Elrod-Branti, this generalization ignored the fact that in North Carolina, deputies are authorized only to perform ministerial law enforcement duties. While the Jenkins court made much of the fact that a sheriff can be liable for the misconduct of a deputy, it also ignored the fact that a sheriff can be liable only when the deputy is acting within the limitations of that ministerial capacity. Jenkins, 119 F.3d at 1165-71 (Motz, J., dissenting).

This erroneous holding that all sheriff's deputies are policymaking employees is in conflict with the decisions of four other Courts of Appeals. See, Burns v. County of

Cambria, 971 F.2d 1015 (3rd Cir. 1992)(examining individual roles of deputies and holding that sheriff failed to demonstrate political affiliation was appropriate job requirement), cert. den., 506 U.S. 1081 (1993); Brady v. Fort Bend County, 58 F.3d 173 (5th Cir. 1995); Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981)(same), cert. den., 456 U.S. 925, 936 (1982); Hall v. Tollett, 128 F.3d 418 (6th Cir. 1997); Thomas v. Carpenter, 881 F.2d 828 (9th Cir. 1989)(same), cert. den., 494 U.S. 1028, 1003 (1990); Francia v. White, 594 F.2d 778 (10th Cir. 1979)(same). Two Circuits, the Seventh and Eleventh, are in accord with the conclusion of the Fourth Circuit in Jenkins. Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991), cert. den., 139 L.Ed.2d 869 (1998); Terry v. Cook, 866 F.2d 373 (11th Cir. 1989).

Without the intervention of this Court, the First Amendment rights of a deputy sheriff will continue to vary according to the vagaries of political boundaries rather than the facts of a given deputy's responsibilities. A patrol deputy in North Carolina who undertakes the same duties and faces the same risks as a deputy serving just across the border in Tennessee does not have the same security from political dismissal. Review by this Court is critical to eliminate this conflict and restore to North Carolina deputies their First Amendment rights.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES C0URT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 96-1965

SCOTT CARTER,
Plaintiff- Appellee,

v.

DANIEL J. GOOD, individually and in his official capacity as Sheriff of Rutherford County; AETNA LIFE & CASUALTY COMPANY, Surety,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of North Carolina, at Shelby. Lacy H. Thornburg, District Judge. (CA-94-200-4)

Submitted: April 14, 1998, Decided: May 19, 1998

Before LUTTIG and MOTZ, Circuit Judges, and HALL, Senior Circuit Judge.

Reversed and remanded by unpublished per curiarn opinion.

COUNSEL
G. Michael Barnhill, W. Clark Goodman, WOMBLE, CARLYLE, SANDRIDGE & RICE, P.L.L.C., Charlotte, North Carolina, for Appellants. Anita S. Hodgkiss, Rebecca S. Thorne, FERGUSON, STEIN, WATT, WALLAS, ADKINS, GRESHAM & SUMTER, P.A., Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Scott Carter, a former deputy sheriff in Rutherford County, North Carolina, brought suit under 42 U.S.C. § 1983 (1994), against Daniel Good, the county Sheriff, after Good allegedly fired Carter for political reasons. Caner obtained a position as a road deputy with the Sheriffs Department ("department") in April 1990, when Ed Searcy, a Democrat, was the sheriff. In the fall of 1990, Good, a Republican, took office. Good came up for reelection in 1994. Carter's supervisor, John Smart, Jr., resigned from his position within the department in the fall of 1993 after announcing his plans to run against Good. Carter's father-in-law was Smart's close friend and ardent political supporter.

Carter alleges that during the campaign, Good solicited information from him regarding Smart's campaign strategy, and told him that he would be fired if he campaigned for Smart. Subsequently, Good and two other superior officers met with Carter and accused him of interfering with a federal drug investigation. As a result of this meeting, Good met with Carter in February 1994 to inform him that he was being transferred to the jail, which Carter considered to be an undesirable assignment. During this meeting, Carter told Good he would be supporting Smart "100 percent."

On March 4, 1994, Carter and a friend visited a local pizza restaurant, where they saw several on-duty members of the department. One officer approached Carter to express his

condolences regarding Carter's transfer. There is some controversy over whether Carter attempted to give the on-duty officer a political brochure supporting Smart, but it is undisputed that Carter told the on-duty officer that he had been the only deputy sheriff with "the balls" to tell Good that he was supporting Smart for sheriff. Carter was wearing a "John Smart for Sheriff" hat at the time of the exchange.

After Good received word of this incident, Carter was terminated. While the defense alleges that Carter was guilty of various acts of insubordination prior to this incident, Good admitted at his deposition that the incident at the pizza restaurant precipitated Carter's termination. Other deputy sheriffs secretly recorded conversations with Good during the campaign in which he told them that if they did their jobs and did not campaign for his opponent they would retain their jobs. According to Carter, officers who opposed Good but did not actively campaign for his opponent retained their jobs after Good's reelection.

In Carter's view, therefore, his termination was not the result of his political affiliation, but the result of his verbalization of his opposition to Good. Carter contends that his statement to Good that he would support Smart, as well as his statement at the restaurant that only he had the courage to express his political stance, together with his sporting of the hat endorsing Smart, precipitated his termination. The district court agreed that this case involved alleged retaliation for the exercise of free speech rights, and thereby analyzed the case under the Supreme Court authorities applicable to such cases. See Connick v. Myers, 461 U.S. 138 (1983). See also Pickering v. Board of Educ., 391 U.S. 563 (1968). In applying these authorities, the district court found that Carter engaged in protected speech on the three occasions mentioned and that, for purposes of summary

judgment, Good failed to prove that his interest in the efficient operation of his department outweighed Carter's right to political expression. In denying Good's motion for summary judgment, the district court went on to find that Good was entitled to neither qualified nor Eleventh Amendment immunity, and allowed Carter's suit, which included pendent state claims, to proceed to trial.

After Good appealed, we placed this case in abeyance pending our decision in Jenkins v. Medford, 119 F.3d 1156 (4th Cir. 1997) (en banc), cert- denied, 118 S. Ct. 881 (Jan. 26, 1998). After issuance of our decision, the parties submitted supplemental briefs addressing the impact of our decision on this case. Thus, the appeal is now ripe for disposition.

In Jenkins, the plaintiffs were North Carolina deputy sheriffs dismissed by a newly elected sheriff for, allegedly, failing to support the new sheriffs election I fail 6 to associate themselves with the new sheriff's campaign, and for supporting other candidates. The plaintiffs sought relief under § 1983 and state law. The district court denied the defendant sheriffs motion to dismiss, rejecting his claim of qualified immunity.

We found the district court's order to be a final order subject to de novo review on appeal. Id. at 1159-60. We then analyzed the plaintiffs' complaint under the analysis employed in Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980). Those decisions hold that the propriety of a political patronage dismissal hinges on whether the relevant hiring authority can demonstrate that party affiliation is an appropriate requirement for effective performance of the position at issue. See Jenkins, 119 F.3d at 1160-61. If so, the general prohibition against political firings is inapplicable. Id.

Next, we examined the role of deputy sheriffs in North Carolina and concluded that "the office of deputy sheriff is that of a policymaker." Id. at 1164. Moreover, we found that whenever the position at issue "resembles" that of a policymaker, a communicator, or a person who is privy to confidential information, "then loyalty to the sheriff is an appropriate requirement for the job." Id. Accordingly, we held that "newly elected or re-elected sheriffs may dismiss deputies either because of party affiliation or campaign activity, either basis serves as a proxy loyalty to the sheriff." Id. (Emphasis added). In finding that campaign activity could signify disloyalty just as much as party affiliation, we noted that "[w]e can think of no clearer way for a deputy to demonstrate opposition to a candidate for sheriff . . .than to actively campaign for the candidate's opponent." Id. at 164-65. Because the deputies in Jenkins actively campaigned against the elected sheriff, we concluded that their dismissal violated no constitutional right. Absent such a violation, the defendant sheriff was entitled to qualified immunity. We therefore directed the district court to dismiss the plaintiffs' federal action as well as their pendent state claim. Id. at 1165.

Carter argues on appeal that the Jenkins decision is inapplicable to this case. He contends that he was fired for the content of his speech, rather than his political affiliation. He says that other deputy sheriffs who opposed Good but did not actively campaign against him kept their jobs, demonstrating that it is speech, rather than political affiliation, that motivated his termination. He therefore asserts that the Connick-Pickering analysis, rather than the Elrod-Branti analysis employed in Jenkins, applies to this case, and that the district court properly found that he is potentially entitled to relief under Connick-Pickering because his interest in free speech is not outweighed by Good's interest in the efficient operation of his department.

Carter essentially asserts the same position expressed by the dissent in Jenkins. The dissent believed that the plaintiffs asserted an Elrod-Branti claim based on their allegations that they were dismissed for failing to associate themselves with the winning campaign, but that the deputies also alleged a Connick-Pickering claim based on their contention that they were terminated for supporting opposition candidates. See Jenkins, 19 F.3d at 1169. The dissent sharply criticized the majority opinion for applying the Elrod-Branti analysis to the plaintiffs' claims that they were dismissed for campaigning for the losing candidate. Id.

Moreover, contrary to Carter's assertion, the fact that he was more overt than some of his fellow deputies in opposing Good does not enhance his First Amendment protection in this context. The Jenkins decision relied on the reasoning of the Seventh Circuit in its decision in Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991). In Upton, two deputy sheriffs were dismissed by newly elected sheriffs because they openly supported the incumbent sheriff during the campaign. Deputy Upton displayed a campaign bumper sticker on his car and spoke to reporters in his capacity as a union member about the union's support of the incumbent. The other deputy, Jack Thulen, put up signs, attended fundraisers, and vociferously supported the incumbent. The Seventh Circuit applied an Elrod-Branti analysis, and concluded that by politically aligning themselves with the opposition candidates in such an overt manner, the plaintiffs thwarted the prevailing sheriffs ability to entrust those deputies to carry out his policies. The court stated:

> Given the dependency of the sheriff (and his political survival) on his deputies' job performance, it is

> understandable why a sheriff might believe that party loyalty is an appropriate consideration for a deputy sheriff. This conclusion is especially true for Jack Thulen . . . . Thulen took a high profile in a hotly contested campaign which involved critical policy disputes relating to the proper operation of the Sheriffs Department. Thulen's political involvement extended beyond mere party affiliation; it included active opposition to Marvin Bausman, who became the newly elected Sheriff. To the voting public this could make Thulen appear hostile and unreliable in carrying out the policies of the new Sheriff. Deputy Upton, while apparently not as active (or at least as high profile) in campaign events as Jack Thulen, had certainly made his opposition to candidate (later Sheriff) Thompson well known.

Id. at 1216.

Later in its opinion, the court again emphasized the destructive effect of actively campaigning for a political opponent, as opposed to merely affiliating with the opponent, on the loyalty which a sheriff may demand in the interest of the effective operation of his office under Elrod-Branti. The court stated:

> In some states a politically silent deputy would officially align with a party simply by voting in the primary election. This contrasts sharply with the politically active deputy who, by vociferously campaigning for the loser, encounters Matthew 26:52: "All they that take the sword shall perish with the sword" .... Suffice it to say that under the First Amendment as interpreted by Brand [and Seventh Circuit cases] a sheriff may use political considerations

when deter mining who will serve as deputy sheriff."

Id. at 1218.

Thus, the Elrod-Branti analysis is not displaced merely because a deputy sheriffs opposition to a sheriff goes beyond mere party affiliation. Rather, as found in Jenkins and Upton such analysis, grounded in the desire to protect a sheriffs interest in loyalty so that he may carry out electorally mandated policies, logically applies with arguably even greater force where a deputy actively campaigns for the sheriff's political opponent. Acceptance of the Plaintiffs position in this case would run afoul of our decision in Jenkins.

Carter also alleges that whether he was fired for his political affiliation or for his political speech is a factual question, and that the presence of this factual issue precludes us from reviewing the district court's interlocutory order. We have, however, accepted as true for purposes of our review the facts as alleged by Carter, as we must in reviewing the district court's denial of qualified immunity. See Jenkins, 119 F.3d at 1159. While it is undeniable that the activity for which Carter alleges he was fired involved speech, it is also undeniable that this speech--in particular the speech at the pizza restaurant--constituted overt campaign activity for the sheriff's opponent. Jenkins holds that such activity, as a matter of law, is not constitutionally protected. Therefore, our review of the district court's denial of qualified immunity is not dependent upon any determination of fact.

Because Carter's termination violated no constitutional right, Sheriff Good is entitled to qualified immunity. We therefore direct the district court to dismiss Carter's federal claim. Moreover, the absence of a federal action requires dismissal of

Carter's state claim as well. Id. at 1165. Accordingly, the district court's order denying summary judgment is reversed and this case is remanded for the entry of an order of dismissal.

REVERSED AND REMANDED

APPENDIX B

United States District Court,
W.D. North Carolina, Shelby Division.
June 7, 1996.

Scott CARTER, Plaintiff,

v.

Daniel J. GOOD, individually and in his official capacity as Sheriff of Rutherford County; and Aetna Life & Casualty Company, Surety, Defendants.

Civil No. 4:94CV200.

Anita S. Hodgkiss, C. Margaret Errington, Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., Charlotte, NC, for plaintiff.

G. Michael Barnhill, W. Clark Goodman, Womble, Carlyle, Sandridge & Rice, Charlotte, NC, for defendants.

MEMORANDUM OF OPINION AND ORDER
THORNBURG, District Judge.

THIS MATTER is before the Court on the Defendants' motion for summary judgment and to strike an affidavit submitted by Plaintiff in opposition thereto. For the reasons stated below, the motion to strike is granted and the motion for summary judgment is denied.

I. STANDARD OF REVIEW

A motion for summary judgment is appropriate in any civil action in which there is no genuine issue of material fact and judgment as a matter of law is warranted for one party. Fed.R.Civ.P. 56(c). A genuine issue exists if a reasonable jury considering the evidence could return a verdict for the nonmoving party, here the Plaintiff. *Shaw v. Stroud,* 13 F.3d 791, 798 (4th Cir.1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)).

In ruling on the pending motion, the district court must construe the facts and draw inferences in the light most favorable to the plaintiff. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), *on remand In re Japanese Electronic Products Antitrust Litigation*, 807 F.2d 44 (3d Cir.1986), *cert. denied, Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 481 U.S. 1029, 107 S.Ct. 1955, 95 L.Ed.2d 527 (1987). Defendants have the initial burden of pointing out an absence of facts, combinations of facts or evidence to support the Plaintiffs case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). However, if that is accomplished, Plaintiff must then demonstrate the existence of a triable issue of fact, a burden not met by a mere scintilla of evidence. *Stroud, supra.*

II. FACTUAL BACKGROUND

Plaintiff Scott Carter (Carter) was first employed with the Rutherford County Sheriffs Department (Department) as a road deputy in April 1990. The Sheriff at that time was Ed Searcy

and the Chief Deputy was John Smart, Jr. (Smart), both of whom were Democrats. In the fall of 1990, Daniel Good (Good), a Republican, won the election and took office as Sheriff. Good did not discharge Smart but moved him into the position of captain of the road deputies. As such, Smart became Carter's supervisor. Good named Floyd Laughter (Laughter) as his Chief Deputy. Carter continued as a road deputy under Smart's supervision and in July 1993, was promoted by Good to the position of corporal. Sheriff Good came up for re-election in 1994. In November 1993, Smart announced his plans to run as the Democratic candidate. As a result, Smart resigned from his position in accordance with departmental policy. Carter was terminated from employment in March 1994.

Beyond these facts, the parties do not agree. Carter maintains he was discharged for exercising his free speech right to campaign and vote for Smart; Defendants maintain Carter was terminated for insubordinate conduct. Thus, in keeping with the standard of review for summary judgment, the Court sets forth the remaining facts in the light most favorable to the Plaintiff.

An understanding of the structure of the Sheriffs Department is necessary to the factual context. Directly beneath Sheriff Good in the chain of command was Chief Deputy Laughter. Deposition of Sheriff Daniel J. Good, at 19. Smart was the third in command as captain of the road department. *Id.* Underneath him were five road sergeants, each in charge of a different shift. *Id.*, at 21. Next came the lieutenant of detectives, Captain Gee, who supervised that division, a sergeant in charge of the jail, and a sergeant in charge of the DARE program. *Id.*, at 20, 21, 28. The rank below sergeant was that of corporal. *Id.*, at 24. When a regular road deputy was promoted to the position of corporal, he did not receive any additional income or

responsibilities except when the sergeant was not available on a shift. *Id.*, at 24-5. At that time, he had to function in the same capacity as the sergeant for that shift. *Id.* Until early in 1994, Carter was a corporal in the road division which meant he functioned as a road deputy unless the night shift sergeant was off-duty.

In developing and implementing policies as sheriff, Good took information and advice from Laughter, Smart, and Gee. *Id.*, at 3132. One policy which was reduced to writing involved political activities of members of the Department who were "permitted to support the political party of their choice when they are off-duty. At no time will officers engage in any political activity when they are on-duty, in uniform or while operating an assigned or non-assigned county owned vehicle." Exhibit 1, Policy on Political Activity, *attached to* Good Deposition. As will be noted later, Sheriff Good construed this policy to mean that an off-duty deputy could not communicate about the upcoming election with an on-duty deputy. In addition, Plaintiff claims that while this was the official policy, the Sheriff made it clear to his Department that no one should support any candidate other than him.

In view of the upcoming campaign for sheriff, Good met with employees of the department in November 1993, to

> make sure that they understood several things about the upcoming campaign at that time, one of which was to make sure that they understood that they were under no obligation whatsoever to vote for me, they were under no obligation to provide me with political contri-butions, that they could support the person that they so chose to support, provided that while they were on

> duty, as such, that they were considered to be--I expected them to be loyal to this department and to do their job as an unbiased police officer would the job.

Good Deposition, at 40-41. Members of the Department report that what Good meant by being "loyal" was the forbidding of any political activity, whether on or off duty, unless it was in support of Good. **Affidavit of John Smart, Jr., dated March 29, 1996, at 3, *attached to* Plaintiffs Memorandum in Opposition to Summary Judgment; Affidavit of John Smart, III, at 2-3; Transcript of Recorded Conversation between Sheriff Good and John Smart, III, at 5 ("Again, all you gotta do is do what you're doing and stay out of overt, I mean, you know politics that means working on anyone's campaign. You don't have to work on mine, but you know, by the same token you can't work on anybody else's.")**[1]; Deposition of Scott Carter at 78. At the above-described meeting, Chief Deputy Laughter solicited campaign contributions from on-duty employees after Good left the room. Carter Deposition at 78. Moreover, on at least one occasion, Chief Laughter contributed money to Good's campaign while on-duty when he was approached by other deputies. Deposition of Floyd A. Laughter, at 52, *attached to* Defendant's Memorandum in Support of Motion for Summary Judgment. On another occasion, deputies got together during the changing of shifts, while some were on-duty, to take up money to rent a billboard to support Good's campaign.

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[1] Defendants moved to strike the affidavit of James Butler attached to the Memorandum in Opposition but did not oppose the consideration of this transcript.

Deposition of Donald R. Huckabee, at 84, *attached to* Defendant's Memorandum.

Carter's father-in-law, Robert Jones, was a close friend and ardent supporter of Smart in his campaign for sheriff. Carter claims Good assumed he would know about Smart's plan to run for election from his father-in-law. Thus, Good tried to obtain information from Carter about Smart's intentions. Carter Deposition, at 32-33. During one meeting, Good told Carter that he would be fired if he campaigned for Smart. Id. Carter told Smart about this meeting. *Id.*, at 35.

Good called another meeting with Carter at which Captain Gee and Chief Deputy Laughter were present and during which Carter was accused of interfering with an informant in a federal drug investigation. *Id.*, at 41. Carter explained that he was friends with the narcotics officer involved with the case and simply assisted that officer in selling a Christmas tree to the informant. *Id*, at 41-42

Apparently as a result of the above, Good met with Carter in February 1994, to advise he was being transferred to the jail. *Id*, at 36-37. While Good did not say the "assignment" was permanent, in the interim Carter would not be a road deputy although his rank as corporal was not changed. Id,, at 36-37. During this meeting, Carter told Good he was supporting Smart "100 percent". *Id.*

On March 4, 1994, Carter, who was off-duty, and a friend went to the Pizza Hut in Forest City, North Carolina, after a ball-game. *Id.*, at 58. While there, he saw Officers Huckabee, Guffey, Parker, and Scoggins, all of whom were on-duty. *Id.* Officer Huckabee approached Carter at the table and asked him how he was doing, saying he was sorry Carter had been

transferred to the jail. *Id.*, at 59. Carter's friend handed Huckabee a political brochure for Smart which Huckabee threw back on the table.[2] *Id.*, at 60. Carter told Huckabee that he had been the only deputy strong enough to stand up to Good by telling him whom he supported for sheriff. *Id.*, at 59. During this encounter, Carter was wearing a "John Smart for Sheriff" hat. *Id.*, at 63. Huckabee reported the incident to Good; and on March 8, 1994, Carter was telephoned by Laughter and told his services with the department were no longer needed. *Id.*, at 65.

According to Sheriff Good, the Pizza Hut incident was the event which precipitated Carter's termination. Good Deposition, at 100. After Smart resigned to campaign for office, Sergeant Huckabee complained to Good that Carter had often gone over his head to Smart when he did not agree with assignments, etc.[3] *Id.*, at 52. On another occasion, Huckabee told Carter to serve a warrant on Lena Tipton; but, Carter instead called her and told her to come into the station for service.[4] *Id.*, at 64. Despite the fact that Tipton did come in, Huckabee considered Carter's conduct to be insubordination

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[2] Officer Scoggins provided an affidavit stating that Carter actually slid the campaign literature to Officer Guffey. Affidavit of Billy Scoggins, at 1, *attached* to Defendants' Memorandum in Support of Summary Judgment. Officer Guffey attested to the same facts. Affidavit of Wayne Guffey, at 1, *attached to* Defendants' Memorandum. Officer Huckabee testified at his deposition that when he walked over to Carter's table, Carter's friend slid some literature to him. Huckabee Deposition, at 49. Huckabee did not state he saw Carter give literature to Guffey but testified, "And when I walked up, Scott *had* slid a card to Wayne Guffey ...". (emphasis added).

[3] Although Smart as captain of the road deputies was Carter's supervisor, Huckabee was his direct supervisor.

[4] No date was given for this incident; but, as with all the examples of insubordination, it appears to have occurred after Smart announced his candidacy in November 1993.

because Carter did not tell him Tipton's location. Huckabee Deposition, at 24-25.

Later, Tipton was involved in another incident stemming from an argument with Trudy Lebrun who called 911 asking the sheriffs to arrest Tipton at a certain location. The call was assigned to Carter but as he drove up, so did the complainant who proceeded to get out of her car and become embroiled in a physical altercation with Tipton. Exhibit N, Statement of Scott Carter, *attached to* Plaintiffs Opposition to Summary Judgment. While Carter held Tipton, Lebrun came after her and Carter kicked Lebrun to get her away. *Id.* Lebrun then left in her car and filed a complaint against Carter. Id.

Finally, Good testified that *after* he had terminated Carter, he heard rumors that Carter had "fixed" a driving while impaired charge in return for a contribution to Smart's campaign. Good Deposition, at 116-18. Carter, however, attached the affidavit of Larry Owens, the charged individual, who averred that Carter did nothing of the sort. Affidavit of Larry Owens, *attached to* Plaintiff s Opposition to Summary Judgment.

Good testified the Pizza Hut incident was the "straw that broke the camel's back." Good Deposition, at 100. That, in combination with the above, "was just enough for me to terminate Mr. Carter, and I no longer needed his services." *Id.* However, in response to a question of whether he was planning to terminate Carter prior to the Pizza Hut matter, Good stated

> I was seriously contemplating what to do with Mr. Carter, even after I offered him the chance to work at the jail. I hadn't made my mind up completely, but I was going to give him a chance to work at the jail....

> If the incident at the Pizza Hut had not happened, would you have still fired him?
>
> I don't know. I think it would have depended on Corporal Carter's conduct in the jail and from what happened, how he did his job.

Id., at 100-01.

Smart's son, John Smart, III, and his nephew, Mark Duncan, were deputy sheriffs under Good during the campaign. They secretly tape-recorded a conversation with Sheriff Good in which he told them that as long as they did their jobs and did not campaign for his opponent, they would not be fired.[5] Neither officer was fired and Duncan is still employed by Good.

III. DISCUSSION

A. Discharge in retaliation for the exercise of free speech.

The parties agree that this is not a case of "raw political patronage" and thus, the case need not be analyzed under the Supreme Court's trilogy of *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); and *Rutan v.*

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[5] Defendants have attached an affidavit from Duncan in which he states that his interpretation of Good's comments was that as long as they did not do campaigning while on duty, they would not be fired. Duncan is still employed by Good. On this motion for summary judgment, the Court is bound by the transcript of the tape-recording which John Smart, III, has aver-red as being an accurate and true reflection of the contents of the recording. Defendants have not objected to the accuracy of the transcript.

Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990). The Court agrees.

[1, 2] Plaintiffs action is brought pursuant to 42 U.S.C. § 1983. In order to state a cause of action thereunder, a plaintiff must show (1) the deprivation of a right secured by the Constitution or a federal statute (2) by a "Person" (3) acting under color of state law. *Conner v. Donnelly,* 42 F.3d 220, 223 (4th Cir.1994). Plaintiff claims he was discharged in retaliation for his exercise of free speech. Thus, the first element to consider is whether, accepting Plaintiffs version of the facts, (1) telling Good he supported Smart "100 percent;" (2) wearing a "Elect John Smart Sheriff" hat;[6] and (3) telling on-duty officers that he was the only deputy strong enough to stand up to Good are free speech.

[3-5] A "state government entity may not deprive a person of valuable employment benefits in retaliation for that person's exercise of his first amendment rights." *Wagner ,n Wheeler,* 13 F.3d 86, 90 (4th Cir.1993). The Fourth Circuit has developed a three-pronged test in such cases: (1) that the employee engaged in speech on a matter of public concern; (2) the retaliatory action deprived the employee of a valuable benefit which is not outweighed by the interests of the governmental. entity in lack of disruption of its operations; and (3) "but for" the protected expression, the employer would not have taken retaliatory action. *Id.. Holland v. Rimmer,* 25 F.3d 1251, 1254-55 (4th Cir. 1994); *Jones v. Dodson,* 727 F.2d 1329, 133435 (4th Cir.1984). "Whether a particular expression was, in the first place, upon a matter of legitimate public concern is a

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[6] For purposes of the motion, the Court accepts the Plaintiff's version of the facts of the Pizza Hut incident; i.e., that he did not hand anyone political literature.

question of law for the courts, it is not a question of fact." *Id.*, at 1334.

[6,7] "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers,* 461 U.S. 138, 147-48, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983).

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Id., at 146-47, 103 S.Ct. at 1690. In other words, if the community at large would not be interested in the expression or it is a private matter between employer and employee, the expression is not public. *Holland,* 25 F.3d at 1255.

[8, 91 Carter's first expression was his acknowledgment to Sheriff Good of his support of Smart's campaign for sheriff during a meeting with Good, Captain Gee and Chief Deputy Laughter. Considering the record as a whole, by this time Carter had been told at least once not to support Smart's campaign or he would lose his job. During this meeting, he was transferred into a position which he considered to be punishment for such support, although predicated on what he deemed to be trumped up allegations that he had interfered in a federal drug investigation. It was then that he determined to "go for broke" and told the sheriff who he was supporting in the election. "Speech on matters of public concern is protected

even though it occurs in a private setting." *Maciariello v. Sumner,* 973 F.2d 295, 299 (4th Cir.1992) **(holding investigative conduct of officers into allegations that another officer had altered evidence was protected conduct although done with a personal motive to impugn the officer).** Statements made in private to an employer concerning the employer's policy in contravention of his employees' right to campaign and vote for the candidate of their choice involve matters of public concern. *Connick,* 461 U.S. at 146, 103 S.Ct. at 1689-90 .[7]

Next, it is clear that Carter's wearing of the hat in support of a different candidate is an expression of public concern in the most elementary sense. Likewise, his statement to other officers that he was stronger than they because he dared defy the sheriff in order to support the political candidate of his

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[7] The Court finds the Defendants' citation to the unpublished case of *Olivo v. Mapp, 1995 WL* 339049 (4th Cir.1995), inapposite. When asked to contribute to the sheriffs ail you can eat and drink beer and crab feast to raise campaign funds, Olivo responded that it interfered with his Christian beliefs and encouraged deputies to drink and drive. He was moved into a different position as a form of "punishment" for not contributing to the campaign, but the court found his speech was an expression of private frustration at being asked to contribute rather than a means by which to bring the practice to public attention. Thus, it was found private, not public, expression. Here, Carter's words are more akin to the conduct of the officers in *Maciariello. His* private statement to the sheriff that the unstated policy against campaigning for any other candidate would be defied was a matter of public concern which he proceeded to make public through later actions.

choice is certainly a matter of public concern. It directly confronted an employer's policy of terminating those deputies who supported a different candidate.

[10] Defendants attempt to distinguish the last statement because it was made to on-duty officers, noting the written policy against campaigning by an officer while on duty. First, for purposes of the motion for summary judgment, the Court accepts Plaintiff's position, corroborated by Officer Huckabee, that he did not distribute any literature but merely responded to Huckabee's expression of condolence. The fact that such a comment was made to an officer who was on-duty in response to a conversation initiated by that on-duty officer removes any defense that Carter breached the written policy.

[11-16] This Court therefore finds as a matter of law that the expression in question was protected speech. The next inquiry is whether Carter's interest in free speech is outweighed by the sheriff s interest in the smooth operation of his department during an election year.[8]

Resolution of this question requires striking the proper constitutional balance between the opposing interests, and this in turn requires weighing the degree of "public concern" legitimately had in the particular expression of ideas-as measured by the expression's content and context-against the degree to which the employee's conduct is justifiably viewed by the public employer as an actual or threatened disruption of the conduct of government operations for which the employer

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[8] Carter's interest in continued employment was a valuable benefit although he had no vested tenure in his job. *Huang v. Board of Governor of University of N.C.*, 902 F.2d 1134, 1139-40 4th Cir.1990) (citing *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)).

is responsible.... [E]xpressive conduct, concededly disruptive to some degree, which touches directly upon matters of grave public concern may not justify another discharge .... In making this balancing inquiry, the burden is upon the public employer to convince the court that the balance tips in favor of the governmental interest.

Jones, 727 F.2d at 1334. When the employee's speech involves matters of public concern, as here, the governmental entity "must make a stronger showing of disruption in order to prevail." *Hall v. Marion Sch, Dist.* No. 2, 31 F.3d 183, 195 (4th Cir.1994).

The only disruption Defendants' claim stems from the Pizza Hut incident. Defendants argue that Carter breached the written policy against campaigning on duty by discussing politics with on-duty officers. However, as noted above, the Court has found, for purposes of this motion, that Carter did not breach the policy, did not distribute campaign literature, and merely responded to an inquiry from Huckabee.
Moreover, despite the Defendants' generalization that Carter was in a position of authority and policymaking, Good's deposition shows otherwise. It appears that a corporal's job was the same as that of a road deputy except when the night-shift sergeant was off-duty. And, even then, the captain was on call for consultation. It is therefore highly unlikely that Carter would have been in a position to actually disrupt Good's policy.

Indeed, the only disruption within the Department appears to have been caused by Good's announced policy that no employee could support another candidate. In this regard, the Defendant's evidence is telling. Good testified that Captain Gee told him John Smart, III, and Mark Duncan, Smart's son and

nephew, were concerned for their jobs.

> [T]hey both told Captain Gee that they had been hearing rumors and gossip and words from others that worked in this department that they should be afraid of their job, that they should be concerned that I was going to fire them.

Good Deposition, at 111. Thus, the son and nephew of the candidate opposing Good were concerned they would lose their jobs precisely because of their support of a different candidate.

Moreover, when asked why he terminated Brenda Peeler after his election, Good replied

> I simply told her that I no longer needed her services, and this--as a result of having won the election again, that it was my right, as I saw it and as I looked at the statute, that it was my right not to retain her services.

Good, at 133. Sheriff Good denied that he terminated Peeler because she did not contribute to his campaign. He also denied terminating Deputy May for the same reason. *Id.*, at 134. Good also testified that he removed Reserve Deputy Jim Butler from active to inactive status after he heard rumors that Butler was campaigning for Smart, both on and off duty. *Id.*, at 136-37. In addition, despite the allegation that Carter's conduct made other officers uncomfortable, it appears that other officers of the Department campaigned while off-duty and contacted on-duty officers in the process. Huckabee Deposition, at 84; Laughter Deposition, at 52. Thus, the conduct of the Sheriff and his own officers caused the disruption. The Court finds as a matter of law that Carter had an interest in a valuable benefit and that his interest was not outweighed by the potential

disruption to the Sheriffs Department caused by his free speech.

[17-19] The third prong of the cause of action is whether Carter would have been discharged "but for" his free speech. The resolution of this issue "depends on the identification of what was the cause of the employee's discharge or demotion." *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 880-81 (4th Cir.1984). "[N]otwithstanding proof (or concession) that a public employee's discharge was based at least in part upon overt expressive conduct, . . . an employer may yet avoid liability for violation of protected first amendment rights by proving that the discharge would have been made in any event for reasons unrelated to any exercise of protected first amendment rights. The burden to prove this avoidance defense is upon the public employer." *Jones,* 727 F.2d at 1335 (citing *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977)).

Good claims he had been considering Carter's termination prior to the protected speech issues. Laughter had previously recommended termination based on the incidents described above as insubordination and interference with a federal drug investigation. Laughter Deposition, at 28-30. Good testified that he was unsure whether or not he would have fired Carter if the Pizza Hut incident had not occurred. Good Deposition, at 101. Thus, Defendants have not carried their burden of showing that discharge would have occurred despite the protected speech. In such a scenario, summary judgment is inappropriate. *Jones,* 727 F.2d at 1337 ("where, as here, the evidence raises genuine issues as to the actual reason for an employee's discharge, that motivational issue must of course be resolved by the trier of fact"); *see also, Brawner v. City of Richardson, Tex.*, 855 F.2d 187, 193 (5th Cir.1988)(whether the police officer was discharged for protected speech or for

insubordination was a genuinely disputed issue prohibiting summary judgment and warranting submission to a jury); ***accord Fowler v. Smith,* 68 F.3d 124, 127 (5th Cir.1995); *Bisbee v. Bey,* 39 F.3d 1096, 1100-01 (10th Cir.1994), cert. denied, ___ U.S. ___, 115 S.Ct. 2577, 132 L.Ed.2d 827 (1995)** ("Questions concerning whom to believe in this matter are reserved for the jury."). **The Court therefore finds that summary judgment is inappropriate.**

B. Sheriff Good's status as a person under § 1983 and Eleventh Amendment immunity.

[20, 21] Defendants argue that Sheriff Good is not a person capable of being sued under § 1983 because North Carolina law holds that a sheriff is a state rather than local official. However, in a § 1983 action, state law only determines the capacity of a governmental body to be sued in the federal courts, not whether that body qualifies as a "person" subject to suit under the statute. Fed.R.Civ.P. 17(b); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484, 106 S.Ct. 1292, 1300-01, 89 L.Ed.2d 452 (1986); *Avery v. Burke County,* 660 F.2d 111, 113-14 (4th Cir.1981); *Jenkins v. Medford, Civil* No. 1:95cv126, 1995 WL 914528 (W.D.N.C. April 18,1996).

[22] The Supreme Court long ago established that local governing bodies and their officials may be sued directly under § 1983. *Monell v. Dept. of Soc. Serv. of City of N.Y.,* 436 U.S. 658, 690, 98 S.Ct. 2018, 2035-36, 56 L.Ed.2d 611 (1978). And, whether or not a local governmental body is a "person" for § 1983 purposes is a matter of federal, not state, law. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). The Supreme Court in Will also held that state agencies and state officials acting in their official capacities are not persons under § 1983 when the remedy

sought is monetary damages, although they are persons for purposes of injunctive relief. *Id.* The Defendants' argument that a sheriff and his deputies are state officials and thus not persons under § 1983 disregards a plethora of case law, none of which contains a determination that a sheriff is not a person for purposes of suit under § 1983. *See, e.g., Price v. Sasser,* 65 F.3d 342 (4th Cir.1995) **(North Carolina sheriff and his deputies sued pursuant to § 1983 but case dismissed on summary judgment because no factual issue shown of constitutional deprivation)**; *accord, Gordon v. Kidd,* 971 F.2d 1087 (4th Cir.1992) (also involving a North Carolina sheriff); *Taft v. Vines,* 70 F.3d 304 (4th Cir.1995), *vacated* Jan. 4, 1996, *aff'd,* 83 F.3d 681 (4th Cir.1996) **(North Carolina sheriff and deputies sued under § 1983 but denied qualified immunity; opinion vacated on issue of qualified immunity; after en banc rehearing, officers granted qualified immunity)**; *Gray v. Farley,* 13 F.3d 142 (4th Cir.1993) **(dismissing § 1983 action against West Virginia** sheriff where **plaintiff failed to prove constitutional deprivation)**; *Dotson v. Chester,* 937 F.2d 920 (4th Cir. 1991) **(finding county liable for the conduct of the sheriff in connection with a § 1983 action)**; *Beardsley v. Webb,* 30 F.3d 524 (4th Cir.1994) **("[The deputy sheriff] is not a Virginia state policeman. He is a deputy sheriff of Loudoun County.")**; *Goodwin v. Metts,* 885 F.2d 157 (4th Cir. *1989), cert. denied sub nom. Maxwell* V. *Goodwin,* 494 U.S. 1081, 110 S.Ct. 1812, 108 L.Ed.2d 942 (1990) (South Carolina sheriff); *Logan v. Shealy,* 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub nom. Clements v. Logan,* 455 U.S. 942, 102 S.Ct. 1435, 71 L.Ed.2d 653 (1982).

The Court is aware of the disagreement among district courts in this Circuit concerning whether a sheriff is a "person" for purposes of § 1983. Defendants cite the unpublished case *of Gulledge v. Smart,* 691 F.Supp. 947 (D.S.C. 1988), *aff'd,* 878

F.2d 379 (4th Cir.1989) (table case), in which the Fourth Circuit ruled no triable issue of fact had been presented and agreed with the South Carolina district court's alternative ruling that the sheriff was a state actor. *Wallace v. Kidd, Civil* No. 3:94cv290, also cited by Defendants, is an unpublished case from this District in which it was assumed without decision that the defendants were state officials.

Defendants also rely on state cases. In *Messick v. Catawba County, 110 N.C.App.* 707, 713, 431 S.E.2d 489, 493, *rev. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993), the court assumed without discussion that the sheriff was not a person under § 1983. In *Slade v. Vernon,* 110 N.C.App. 422, 429, 429 S.E.2d 744, 748 (1993), the court found there had been no showing of a violation of a specific constitutional right. As an alternative ruling, the court noted the defendants could not be liable in their official capacities under § 1983 because plaintiff sought only monetary damages, citing *Lenzer v. Flaherty,* 106 N.C.App. 496, 418 S.E.2d 276, *rev. denied,* 332 N.C. 345, 421 S.E.2d 348 (1992). That case held that employees of the state Department of Human Resources were not persons under § 1983. Thus, it is inapposite to a ruling regarding sheriffs. *Clark v. Burke County,* 117 N.CApp. 85, 89, 450 S.E.2d 747 (1994) does not appear to be a cause *of* action based on § 1983. Likewise, *Smith v. Phil*lips, 117 N.C.App. 378, 381, 451 S.E.2d 309, 312 (1994), appears to be a case based on negligence, not § 1983. None of these cases overrules the holding in *Hull v. Oldham,* 104 N.C.App. 29, 41, 407 S.E.2d 611, 618, *rev. denied,* 330 N.C. 441, 412 S.E.2d 72 (1991), that "[i]n providing for the organization of local governments, our Constitution does not make sheriffs state rather than local officers." Nor has the state supreme court made a determination contrary to this holding.

Defendants also cite the opinion in *Braswell v. Ellis*, 950 F.Supp. 145 (E.D.N.C. 1995) (Dupree, J.) in support of their arguments. This Court holds Judge Dupree in high esteem, but respectfully disagrees with his analysis. In concluding that sheriffs are state officials, the court applied the test for determining whether Eleventh Amendment immunity should be afforded. However, the issue of Eleventh Amendment immunity is distinct from qualification as a "person" under § 1983. Indeed, one does not reach the issue of immunity unless the defendant at issue has been found to be person subject to suit under § 1983.

In addition, while it is true North Carolina's state legislature has enacted legislation regarding sheriffs and their departments, this Court cannot find such legislation warrants a conclusion that state control is so rampant that these departments have become arms of the state. ***See, e.g.*, N.C. Const. art. VII § 2 and N.C.Gen.Stat. § 163-1 (concerning election and term of office); N.C.Gen.Stat. § 162-1 (defining disqualifications for sheriffs); N.C.Gen. Stat. §§ 162-13, et *seq.* (describing the duties); N.C.Gen.Stat. § 143-166.30 (allowing for participation in the state retirement system)**. Sheriffs are traditionally law enforcement providers for counties, supplying the gap between the State Highway Patrol and municipal police officers. Their salaries are paid by the counties who also pay any liability claim against them. They are elected by the constituency of the county, not the state. To find that state regulation in some areas converts sheriffs into state employees would be tantamount to finding that they are also federal employees because regulated by various federal laws, such as § 1983. Moreover, such a finding would lead to great disparity among the various county employees, such as social services workers, who are clearly subject to suit under § 1983. Accordingly, this Court holds that the sheriff of a county in

North Carolina is a person subject to suit under § 1983.

[23] Likewise, Defendant Good is not entitled to Eleventh Amendment immunity. The parties each contend the test announced by the Supreme Court in *Hess v. Port Auth.. Trans-Hudson Corp.*, 513 U.S. 30, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994), proves their respective positions. In *Hess,* the Supreme Court stated that the primary concerns "'that underpin the Eleventh Amendment,' [are] that federal court judgments not deplete state treasuries and that the sovereign 'dignity' of the states be preserved." *Gray v. Laws,* 51 F.3d 426, 431 (4th Cir.1995) (quoting *Hess,* 513 U.S. at ___, 115 S.Ct. at 406). Here, there is no question of depletion of the state treasury because the insurance carrier for the county has been named a party. Moreover,

> it appears that a determination that the state treasury will be liable for a particular judgment is largely, if not wholly, dispositive of entitlement to Eleventh Amendment immunity.... If, on the other hand, the state's treasury will not be affected by a judgment in the action, then the availability of immunity ... must be determined by resort to the other relevant considerations referenced by the Court, chief among which are whether the suit will jeopardize "the integrity retained by [the] State in our federal system," and whether the state possesses such control over the entity claiming Eleventh Amendment immunity that it can legitimately be considered an "arm of the state."

Gray, 51 F.3d at 433-34 (citations omitted). Defendants have offered no evidence on these issues and thus, have not met their

first burden on the motion for summary judgment.

C. Sheriff Good's entitlement to qualified immunity.

[24-26] Defendants also argue the sheriff is entitled to qualified immunity from suit against him in his individual capacity. Government officials sued in their individual capacity are protected by qualified immunity as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *DiMeglio v. Haines,* 45 F.3d 790, 794 4th Cir.1995) (quoting *Harlow v. Fitzgerald"* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). This determination is a matter of law. *Id.*

[27] To rule on qualified immunity, the Court must identify the right violated and determine whether the right was clearly established at the time it was violated. *Id,* at 795; *see also, Pritchett v. Alford,* 973 F.2d 307, 312 (4th Cir.1992). Next, the Court should ascertain whether a reasonable person in the Defendants' position would have known that his actions would violate such a light. Id. At the time of the actions taken here, it was clearly established by Supreme Court and Fourth Circuit precedent, *see infra,* that an employee could not be discharged for the exercise of his light to free speech. *Connick,* 461 U.S. at 142, 103 S.Ct. at 1687 **("[F]or at least 15 years, it has been settled that an [employer] cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expressions.").** Moreover, Sheriff Good's comments during the tape-recorded conversation show that not only was he aware of such lights; but also, he clearly intended to violate the written policy of his own department in order to squelch the support by his staff of any candidate other than himself.

D. Punitive damages in connection with the § 1983 cause of action.

[28,29] "Punitive damages are available in section 1983 actions only 'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected lights of others.'" *Goodwin,* 885 F.2d at 165 (quoting *Smith v. Wade,* 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983)). Here, Sheriff Good has been sued in both his individual and official capacities. Defendants correctly note that punitive damages are not available against Good in his official capacity. *Biggs v. Meadows,* 66 F.3d 56, 61 (4th Cir.1995) (citing Hill v. *Shelander,* 924 F.2d 1370, 1374 (7th Cir.1991) **("[P]unitive damages [may] be recovered against a government actor only in an individual capacity suit.")).**

[30] However, the facts of the case are sufficient to submit the question of punitive damages in Good's individual capacity to the jury for determination. *Beardsley,* 30 F.3d at 531 **(holding the issue of punitive damages was a jury question concerning a defendant who told plaintiff not to complain of sexual harassment because she had chosen a field primarily dominated by men);** *see also, Sevigny v. Dicksey,* 846 F.2d 953, 959 (4th Cir.1988) **(punitive damages awarded against police officer who disbelieved mother's statement that her child drove car into a garage despite two witnesses' corroboration and arresting her as well as notifying department of social services of her neglect).** The tape-recorded statement in which Good told employees not to support or campaign for anyone except him is evidence of malicious or wanton conduct done in reckless disregard or indifference of their lights. Likewise, a jury could believe the

evidence that Good told all employees at a meeting not to campaign for anyone else and that he determined to fire Carter in retaliation for his open defiance of Good's orders.

E. State law claims.

[31] In addition to Plaintiffs federal cause of action under § 1983, he also stated a cause of action for a violation of the North Carolina Constitution. Defendants move for summary judgment on the ground that where there is an adequate state law remedy, a direct cause of action is not available under the State Constitution. While Defendants cite *Corum v. University of North Carolina,* 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992), in support of their argument, that case also involved a Plaintiff who sued pursuant to a federal § 1983 claim and a direct claim based on the State Constitution. In fact, that case also involved the termination of an employee for his free speech and the court held, without even mentioning a cause of action for wrongful termination, "we hold that plaintiff does have a direct cause of action under the State Constitution for alleged violations of his freedom of speech rights, guaranteed by Article I, Section 14." *Id.,* at 786, 413 S.E.2d at 292. Defendants' motion is thus denied.

Next, Defendants argue that the state constitutional claims for violation of free speech fail for the same reasons as the federal claim, In view of the ruling *infra,* this argument as well is rejected.

[32] Plaintiff alleges a cause of action for a violation of N.C.Gen.Stat. § 153A-99 which prohibits counties from restricting county employees in any manner concerning their political affiliation and activities. Defendants seek judgment on the grounds that sheriffs are not county employees. This argument has been previously rejected. Moreover, the North

Carolina Court of Appeals has recently ruled that discharge of a county employee because of his political affiliation and activities, if true, contravenes rights guaranteed by the State Constitution and the prohibition against political coercion in county employment, citing N.C.Gen.Stat. § 1*53A-99. Vereen v. Holden,* 121 N.C.App. 779, 468 S.E.2d 471(1996).

[33] Finally, Defendants argue that to the extent Plaintiff states a cause of action for wrongful termination in violation of public policy, that claim must be dismissed. In *Vereen* the Court of Appeals also stated that the district court erred in dismissing a wrongful termination claim based on a violation of public policy as stated in N.C.Gen. Stat. § 153A-99. *Id.*, 468 S.E.2d at 475. Thus, this motion as well is denied.

F. Motion to strike affidavit of Jim Butler.

[34] In rendering the above ruling, the Court found it unnecessary to depend on the affidavit in question. Thus, Defendants' motion to strike the affidavit is granted without any ruling as to its admissibility.

IV. ORDER

IT IS, THEREFORE, ORDERED that Defendants' motion for summary judgment is hereby **DENIED**.

IT IS FURTHER ORDERED that Defendants' motion to strike the affidavit of Jim Butler, dated March 28, 1996, is hereby **ALLOWED**, and this affidavit is hereby **STRICKEN** from the record.

Supreme Court, U.S.
FILED
OCT 16 1998
OFFICE OF THE CLERK

No. 98-295

In The

Supreme Court of the United States

October Term, 1998

SCOTT CARTER,

Petitioner,

vs.

DANIEL J. GOOD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF RUTHERFORD COUNTY; AETNA LIFE & CASUALTY COMPANY, SURETY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is political loyalty an appropriate requirement for the job of deputy sheriff in North Carolina?

STATEMENT PURSUANT TO RULE 29.6

Respondent Aetna Life & Casualty Company, now known as Travelers Casualty & Surety Company, has no nonwholly owned subsidiaries. The parent corporation is Travelers Property Casualty Company. Pursuant to a recent merger with CitiCorp, the parent company will become CitiGroup.

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STATEMENT OF THE CASE

For the most part, the respondents agree that the petitioner's "Statement of the Case" provides an accurate synopsis of the relevant facts of record under the caption "Factual Background" and an accurate summary of the decisions of the courts below under the caption "Proceedings Below." Rather than recast each element of the petitioner's Statement of the Case, the respondents will instead note the following areas of disagreement with that portion of his Petition:

A. Factual Background

- In an attempt to draw a narrow distinction between this case and the applicable legal authority, the petitioner attempts to recast the basis for his claims as actual speech in opposition to Sheriff Good. The allegations contained in the Complaint reveal, however, that the claims at issue in this case arise from the much broader contention that Sheriff Good fired Carter "because Carter supported Good's political opponent, John Smart." (J.A., p. 7, § 1)[1]

- The petitioner submits that his statement at a local Pizza Hut to on-duty officers, while wearing a "John Smart for Sheriff" hat, that he was "the only one with the balls to stand up to Sheriff Good and tell him who [he] supported" was the "primary factor" which motivated Sheriff Good to terminate him. (Pet., p. 6) The record reveals, however, that a pattern of misconduct and insubordination preceded the petitioner's termination:

---

1. Consistent with the Petition, references to the Joint Appendix in the court below are designated J.A.

- Sheriff Good was informed in late 1993 that a confidential drug informant had complained that Carter contacted her and attempted to discuss matters related to drug investigations. (J.A., pp. 100-101, 154-159) In or about February of 1994, Sheriff Good learned that the drug informant had again complained that Carter contacted her and attempted to discuss matters related to drug investigations. (J.A., pp. 100-102, 190-191)

- Sheriff Good was informed that Carter had not been following the proper chain of command within his road patrol crew. (J.A., pp. 145-146, 234) On one occasion, a superior officer informed Carter that warrants needed to be served on a woman named Lena Buckner Tipton ("Tipton"). Carter was able to contact Tipton on the telephone, but would not tell his supervisor where she was. (J.A., pp. 112-114, 151, 211-212) Sheriff Good considered this conduct to be insubordination. (J.A., pp. 151)

- A woman named Trudy LeBrun arranged a meeting with Tipton at a funeral home in an attempt to facilitate the service of criminal warrants. LeBrun contacted the Sheriff's department and requested that an officer be dispatched to the funeral home to serve the warrants. Scott Carter was the officer who went to the funeral home. LeBrun later complained that Carter allowed Tipton to physically strike her and that when she finally retaliated, Carter pushed her to the ground and kicked her in the leg. (J.A., pp. 117-121, 151-153, 205-208)

Accordingly, Sheriff Good testified that, the petitioner's disloyal and disrespectful comment in the

Pizza Hut was merely "the straw that broke the camel's back after a long . . . series of events which was . . . just enough for [Sheriff Good] to terminate Mr. Carter . . . it was violations that [Sheriff Good] just didn't need going on in [his] department." (J.A., pp. 173-174)

- The petitioner implies that he had minimal supervisory responsibilities as a corporal in the sheriff's department. (Pet., p. 4) However, he testified that he was required to assume supervisory responsibilities "[q]uite regularly", and when he was supervising the shift at night, he was "the highest ranking official [on duty]." (J.A., pp. 56-57) While Carter was supervising the shift, Sheriff Good considered him "the direct extension of my policy and procedures, and . . . expected him to carry them out." (J.A., p. 137)

- The petitioner implies that his transfer to a jailer's position shortly before his termination was related to the Sheriff's purported warning to "stay out of politics." The record reveals, however, that Sheriff Good decided to transfer Carter to a jail assignment upon learning in February of 1994 that a confidential drug informant had again complained about Carter approaching her and asking about drug investigations. (J.A., pp. 168-170, 233) He did not demote Carter when he transferred him to the jail. (J.A., pp. 166-167, 169-170, 218, 233) When Sheriff Good and his Chief Deputy met with Carter to inform him that he would be transferred to the jail, Carter informed Sheriff Good for the first time that he intended to support John Smart for Sheriff. (J.A., pp. 64-65, 233) Carter testified that the Sheriff responded by telling him that it was his right to support whomever he wanted as long as he did it on his own time. (J.A., p. 72) It was only after this meeting that Carter started campaigning for John Smart's campaign for sheriff. (J.A., pp. 72, 74)

- The petitioner does not fully explain the sequence and timing of the events which followed Sheriff Good's decision to transfer him to the jail. When Sheriff Good notified Carter that he would be transferred to the jail, Carter requested vacation time to get his personal vehicle in working condition. (J.A., p. 73) It was while Carter was on vacation that he went to the Pizza Hut and told on-duty officers that he was the "only one with the balls" to tell the Sheriff whom he supported.[2]

- The petitioner notes that Sheriff Good's policy on political activities was consistent with N.C. Gen. Stat. § 153A-99(a), which serves "to ensure that county employees are not subjected to political or partisan coercion while performing their job duties, and to ensure that public funds are not used for political or partisan activities. . . ." Section 153A-99(a), however, does not apply to deputy sheriffs. It is well-established under North Carolina law that deputy sheriffs are *not* employees of the county or the county board of commissioners. *Clarke v. Burke County*, 117 N.C. App. 85, 450 S.E. 2d 747 (1994). *Peele v. Provident Mutual Life Ins. Co.*, 90 N.C. App. 447, 449-50, 368 S.E. 2d 892, 894, *disc. rev. denied*, 323 N.C. 366, 373 S.E. 2d 547 (1988). In fact, under North Carolina law, a county board of commissioners has *no* authority to control the hiring, firing and supervision of a county sheriff's employees. *Peele*, *supra*; N.C. Gen. Stat. § 153A-103(a)(1).

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2. The sheriff was also informed, and reasonably believed, that Carter had distributed campaign literature to on-duty officers at Pizza Hut. (J.A., pp. 126-127, 171-172, 215-216)

B. Proceedings Below

- The petitioner incorrectly implies that the respondents have conceded that this case is not properly analyzed under the standards of *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980). When the respondents initially filed their Motion for Summary Judgment in the district court, they were constrained by the unduly narrow holding in *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), that the *Elrod-Branti* "political patronage" analysis applied only to cases involving party affiliation. While the respondents' appeal was pending, however, the Fourth Circuit Court of Appeals rejected the narrow approach of *Jones* and applied the *Elrod-Branti* analysis more broadly to claims arising out of political loyalty. *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (*en banc*), *cert. denied*, 118 S. Ct. 881 (1998). The respondents submit that the court below correctly rejected the petitioner's claims under the *Elrod-Branti* standard as applied in *Jenkins*.

- The petitioner continues to emphasize the decision of the district court, which was reversed by the Court of Appeals and is not at issue before this Court.

- The petitioner gives short shrift to the well-reasoned analysis of the unanimous decision which he now asks this Court to review and the *Jenkins* decision on which it is based. In particular, he fails to acknowledge the fundamental basis for both decisions that:

> The circuits which have examined the interplay between the voters, the sheriff and his policies, and the role of deputies in the implementation of policy, have concluded that political affiliation and loyalty to the sheriff are appropriate job requirements. . . . [Our] examination of the role of deputy sheriffs leads us to conclude that in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable. . . . **We do not believe it was ever contemplated that a sheriff must attempt to implement his policies and perform his duties through deputies who have expressed clear opposition to him.**

Jenkins, 119 F.3d at 1163-65 (citations and footnotes omitted, emphasis added).

REASONS FOR DENYING THE WRIT

The petitioner would have this Court review the unanimous panel decision of the Fourth Circuit based on an impossibly subtle and artificial distinction between political disloyalty and actual "speech" which demonstrates political disloyalty. The court below, however, recognized that the petitioner's claims raise the very concerns which *Elrod* and *Branti* address. Its decision is therefore consistent with this Court's jurisprudence and the Petition for a Writ of Certiorari should be denied.

A. The Court Below Properly Considered the Petitioner's Claims Under the *Elrod-Branti* Standard.

1. *The Opinion of the Unanimous Fourth Circuit Panel Is Not Contrary to this Court's Opinion in O'Hare*

The petitioner submits that the court below erred in applying the *Elrod-Branti* standard to his claims, because the basis for his dismissal was, at least in part, actual "speech." Relying on dicta in *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 116 S. Ct. 2353 (1996), he contends that any claim which arises, to any extent, from alleged retaliation for actual speech must be decided under the balancing test of *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684 (1983) and *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563, 88 S. Ct. 173 (1968).[3] The petitioner's reliance on *O'Hare* for this proposition is misplaced. This Court did not need to address in *O'Hare* the question of which standard to apply, because "the Court of Appeals, based on its understanding of the pleadings, considered this simply an affiliation case . . ." subject to the *Elrod-Branti* standard. 116 S. Ct. at 2358. Instead, *O'Hare* focuses on whether the protections of the *Elrod-Branti* standard should also extend to independent governmental contractors.

To the extent that *O'Hare* is even relevant, it demonstrates the propriety of deciding the petitioner's claims under the *Elrod-Branti* standard. The plaintiff in *O'Hare*, like the petitioner in this case, claimed to have been terminated for actions which went beyond mere political affiliation. He also "supported the campaign of Paxson's opponent and displayed the opponent's

3. This is the reasoning of the dissent which the *en banc* majority rejected in *Jenkins*. The petitioner's contention amounts to a renewed attempt to have this Court review *Jenkins*, which it declined to do last term. 118 S. Ct. 881 (1998).

campaign posters at O'Hare's place of business." Even so, his claims were decided under the *Elrod-Branti* standard. The opinion of the unanimous panel of the Court of Appeals is therefore consistent with this Court's decision in *O'Hare*.

2. *The Petitioner's Claims Implicate the Very Issues Which Elrod and Branti Address*

A more appropriate and accurate analysis compares the essence of the petitioner's claims to the underlying purpose of the *Elrod* and *Branti* decisions. Although he now argues otherwise, the essence of petitioner's claims is that he was terminated because Sheriff Good elevated political loyalty to a job requirement for deputies in his department. In support of his claims, the petitioner has consistently offered evidence which, he contends, demonstrates that Sheriff Good had an unwritten policy requiring total political loyalty of his deputies. More specifically, the petitioner relies on evidence which (according to petitioner) shows: that the sheriff allowed campaign activities on his behalf even while on-duty; that the sheriff specifically told two deputies, "You don't have to work on [my campaign], but by the same token you can't work on anybody else's"; that the sheriff held a departmental meeting at which "[h]e warned everyone present that if [they] could not give him the loyalty that he demanded, then [they] should resign"; that a reserve officer was placed on inactive duty for supporting John Smart; and that two other deputies who did not contribute to the sheriff's campaign were not retained after the election. (Pet., pp. 4-5; J.A., pp. 34, 37-38, 47, 93, 130-131, 187-190, 217)

Simply stated, the petitioner's contentions raise the exact issue which *Elrod* and *Branti* directly address —

> [I]f an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency.

Branti, 445 U.S. at 517, 100 S. Ct. at 1294, *citing Elrod*, 427 U.S. at 366, 96 S. Ct. at 2686. Accordingly, the unanimous panel of the court of appeals properly examined the position of deputy sheriff under North Carolina law to determine whether " 'there is a rational connection between shared ideology and job performance.' " *Jenkins*, 119 F.3d at 1161, *citing Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990).

It is ultimately immaterial that plaintiff's First Amendment claim arises in part from actual "speech" in support of Sheriff Good's opponent. Drawing the fine distinction between political disloyalty and speech demonstrating political disloyalty which the petitioner urges this Court to consider would pose a nearly impossible challenge in cases such as this where the plaintiff claims to have been dismissed for political disloyalty which happened to include actual expression. The Second Circuit Court of Appeals addressed this issue and concluded:

> It would seem, then, that where such an employee's speech activities contributed to further interference with the discharge of his public duties, an employer should be no more constrained in acting against the employee than if the employee had remained silent. . . .
>
> > It would be a strange rule that gave more job protection to policymaking employees who vociferously attack their superiors than to policymaking employees who do

> their best to serve their superiors faithfully but have the misfortune to belong to the wrong party. It would give policymaking employees an incentive to attack their bosses in order to retain their jobs.

McEvoy v. Spencer, 124 F.3d 92, 101 (2d Cir. 1997), *citing Wilbur v. Mahan*, 3 F.3d 214, 218 (7th Cir. 1993).

Similarly, with regard to deputy sheriffs, the unanimous panel of the court below explained:

> "In some states a politically silent deputy would officially align with a party simply by voting in the primary election. This contrasts sharply with the politically active deputy who, by vociferously campaigning for the loser, encounters Matthew 26:52: 'All they that take the sword shall perish with the sword' ". . . . Thus, the *Elrod-Branti* analysis is not displaced merely because a deputy sheriff's opposition to a sheriff goes beyond mere party affiliation. Rather, as found in *Jenkins* and *Upton* [*v. Thompson*, 930 F.2d 1209 (7th Cir. 1991)] such analysis, grounded in the desire to protect a sheriff's interest in loyalty so that he may carry out electorally mandated policies, logically applies with even greater force where a deputy actively campaigns for the sheriff's political opponent.

App., pp. 7a-8a, *citing Upton*, 930 F.2d at 1218.

In short, the petitioner's contention that he was dismissed because he supported the sheriff's political opponent presents precisely the sort of claim which *Elrod* and *Branti* are intended to address. Contrary to the implication of his Petition, Scott

Carter is not entitled to greater protection merely because his political affiliation took the form, in part, of actual speech. The Court should decline the petitioner's invitation to consider an impossibly subtle and unworkable distinction between silent political affiliation and political affiliation which amounts to actual expression.

B. The Petitioner Overstates the "Conflict In The Circuits" Regarding the Applicable Standard.

The petitioner contends that this Court should issue a writ of certiorari to resolve a conflict in the circuits regarding the appropriate standard to apply to First Amendment claims of deputies who contend that they were terminated in retaliation for their political disloyalty. The petitioner's own authority reveals, to the contrary, that there is a developing consensus among the circuits to decide such claims under the *Elrod-Branti* standard. First, even the petitioner concedes that the standard which the Fourth Circuit Court of Appeals applied in this case is consistent with decisions in the First, Second and Seventh Circuits. *See e.g.*, *McEvoy*, 124 F.3d at 98-100 ("[W]here the lines between political association are often blurred, we conclude that adverse action may be taken against a policymaker because of political affiliation, even if the employer was also motivated in part by speech protected under *Pickering*."); *Rodriquez v. Munoz*, 808 F.2d 138 (1st Cir. 1986); *Warzon v. Drew*, 60 F.3d 1234 (7th Cir. 1995).

Further, in *Burns v. County of Cambria, Penns.*, 971 F.2d 1015 (3rd Cir. 1992), the Third Circuit applied the *Elrod-Branti* standard to the claims of deputies who alleged that they were terminated for their failure to support the sheriff and/or their support of candidates who opposed him. Similarly, in *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997), the Sixth Circuit applied the *Elrod-Branti* standard to deputies' claims, even though some

of the plaintiffs' political disloyalty took the form of actual expression. The United States Court of Appeals for the Ninth Circuit also applied the *Elrod-Branti* standard to similar claims in *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990).

Even the Fifth and Eleventh Circuits, on which the petitioner heavily relies, stop short of outright rejecting the *Elrod-Branti* standard. In *Vojvodich v. Lopez*, 48 F.3d 879 (5th Cir. 1995), the Fifth Circuit appears to apply both the *Elrod-Branti* and *Pickering-Connick* standards, noting that the heart of the *Elrod-Branti* test is whether political loyalty is an appropriate requirement for effective performance of the public office at issue and then proceeding to conduct a balancing of interests. Similarly, in *Morris v. Crow*, 117 F.3d 449 (11th Cir. 1997), the Eleventh Circuit acknowledged that

> Morris' complaint might be read to state a claim under both [*Pickering-Connick* and *Elrod-Branti*] theories. . . . Because Morris did not press an *Elrod/Branti* political patronage claim in the district court, we have no occasion to discuss the merits of such a claim under the facts of this case.

117 F.3d at 456.

In short, the decision of the Fourth Circuit in the present case is consistent with the developing consensus among the circuits to consider claims arising out of political disloyalty under the *Branti-Finkel* standard, even where the political disloyalty takes the form, in part, of actual expression. There is no conflict among the circuits to justify the issuance of a writ of certiorari.

C. Political Loyalty is an Appropriate Requirement for the Position of Deputy Sheriff in North Carolina,

The petitioner further contends that the Court should grant its Petition because the *en banc* majority's conclusion in *Jenkins* that political loyalty is an appropriate job requirement for a deputy sheriff in North Carolina, on which the unanimous panel relied in the present case, is in conflict with the decisions of other Courts of Appeals.[4] This contention disregards this Court's instruction in *Elrod* and *Branti* that an inquiry must be conducted on a case-by-case basis. *Elrod*, 427 U.S. at 367-368; *Branti*, 445 U.S. at 519.

Consistent with this Courts guidance, the courts of appeals have applied the *Elrod-Branti* standard by focusing on the particular position at issue to determine whether political loyalty or affiliation is an appropriate job requirement. *See e.g. Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990); *Brown v. Trench*, 787 F.2d 167 (3rd Cir. 1986); *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985). When evaluating the position of employment, the "relevant inquiry is to the function of the public office in question and not the actual past duties of the particular employee involved." *Brown*, 787 F.2d at 168.

Accordingly, the *en banc* majority in *Jenkins* thoroughly examined the role of deputy sheriffs in North Carolina in order to determine whether political loyalty is an appropriate requirement for the position. The *en banc* court noted:

> [Other] circuits have found that sheriffs, as elected officials, require loyal deputies to help them implement their policies — policies presumably sanctioned by the electorate. . . . The circuits which

4. Again, this contention is nothing more than an indirect attempt to have this Court review the conclusion of the *en banc* court in *Jenkins*, which this Court has already declined to do. 118 S. Ct. 881 (1998).

have examined the interplay between the voters, the sheriff and his policies, and the role of deputies in the implementation of policy, have concluded that political affiliation and loyalty to the sheriff are appropriate job requirements. . . .

Following the lead of the Seventh and Eleventh Circuits, we now consider the specific political and social roles of sheriffs and their deputies in North Carolina. The North Carolina legislature has declared that "[t]he offices of sheriff and deputy sheriff are . . . of special concern to the public health, safety, welfare and morals of the people of the State." The sheriff is such an important political figure, the legislature has prescribed a mandatory procedure for filling vacancies in that office: "If the sheriff were elected as a nominee of a political party, the board of commissioners shall consult the county executive committee of that political party . . . and shall elect the person recommended" by that party.

The North Carolina legislature has also recognized the special status of sheriffs' deputies in the eyes of the law: "The deputy sheriff has been held by the Supreme Court of this State to hold an office of special trust and confidence, acting in the name of and with powers coterminous with his principal, the elected sheriff." The sheriff may not delegate final responsibility for his official duties, but he may appoint deputies to assist him. Our circuit and North Carolina state courts agree that the sheriff can be held liable for the misbehavior of the deputies. Presumably it is for these reasons that the legislature has made deputies at-will employees, who "shall serve at the pleasure of the appointing officer."

> This examination of the role of deputy sheriffs leads us to conclude that **in North Carolina, the office of deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable. We therefore hold that such North Carolina deputy sheriffs may be lawfully terminated for political reasons under the Elrod-Branti exception to prohibited political terminations. . . .**

119 F.3d at 1163-64 (citations and footnotes omitted, and emphasis added).

The petitioner points to decisions in which courts of appeals have found that political loyalty is not an appropriate requirement for the position of deputy sheriff in other jurisdictions. Under the case-by-case approach of *Elrod* and *Branti*, however, these cases are not relevant to the determination of whether political loyalty is an appropriate job requirement for North Carolina deputy sheriffs. Further, the Fourth Circuit is not alone in having found, under a particular state's law, that political loyalty is an appropriate requirement for the position of deputy sheriff. As the *en banc* court noted in *Jenkins*, both the Seventh and Eleventh Circuits reached a similar conclusion with regard to deputies in Illinois and Alabama, respectively. *See Upton*, *supra*; *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989).

The office of sheriff is uniquely a creation of state law. The relationship between the electorate, the sheriff and deputy sheriffs is similarly an issue of state law. The Fourth Circuit is in a better position than this Court to interpret North Carolina law. *See McMillian v. Monroe County*, 117 S. Ct. 1734 (1997). After thorough analysis of the status of deputy sheriffs under North Carolina law, the Fourth Circuit correctly concluded in *Jenkins* that North Carolina sheriffs may require political

loyalty of their deputies. The unanimous panel properly relied on that analysis in the present case. The purported "conflict" among the circuits as to whether political loyalty is an appropriate job requirement for North Carolina deputy sheriffs is illusory, and this Court should deny the Petition for a Writ of Certiorari.

CONCLUSION

As the *en banc* court of appeals noted in *Jenkins*:

> In jurisdictions where the sheriff is elected by popular vote, the triumph of one candidate indicates voter approval of the candidate's espoused platform and general agreement with the candidate's "expressed political agenda." . . . By choosing a particular candidate to protect the citizens of the county, the electorate vests in the sheriff broad discretion to set and implement the policies necessary to carry out his goals. The sheriff owes a duty to the electorate and the public at large to ensure that his espoused policies are implemented.

119 F.3d at 1162. This analysis captures the essence of the issue at dispute in the present case. Plaintiff would have this Court establish a standard which would allow him greater leeway to derail the sheriff's policies, and consequently the mandate of the voters, merely because a certain portion of his political disloyalty took the form of actual expression. Such an artificial and subtle distinction would prove unworkable, futile and contrary to the interests of justice.

The unanimous panel of the court of appeals correctly applied the proper standard to the petitioner's claims, and this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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